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No. 85-1370

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC. .....*Appellant*

VS.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS .....*Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

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ARKANSAS LEGISLATIVE DIGEST, INC.

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QUESTIONS PRESENTED

I.

DOES ARTICLE III OF THE UNITED STATES CONSTITUTION PRECLUDE CONSIDERATION OF THIS APPEAL?

II.

DOES APPELLEE'S TAX STRUCTURE VIOLATE THE FIRST AMENDMENT?

III.

DID THE ARKANSAS SUPREME COURT CORRECTLY DECLINE TO AWARD APPELLANT ATTORNEYS' FEES UNDER 42 U.S.C. §1983?

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ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellee's statement differs from that of Appellant in the following manner:

No declaratory judgment action was filed by Appellant below and thus, cannot be a basis for appeal from the Arkansas Supreme Court decision.

While Appellant pays sales tax on the sales of *Arkansas Times*, all other magazines whether religious, professional, trade and sports *or* of general interest are taxed as well if they are not "printed and published within the State . . . [and] sold through regular subscriptions."

After administrative hearing and a lower Court ruling on this case, Appellee's taxing structure was upheld by the

Arkansas Supreme Court on October 14, 1985. On petition for rehearing, the Court considered the constitutional issues, but found no First Amendment violation and that it was unnecessary to reach a Fourteenth Amendment question since if the tax exemption failed, it would not have availed Appellant the relief it requested.

SUMMARY OF ARGUMENT

In this Court, Appellant contends the failure to extend the exemptions for newspapers [§84-1904 (f)] and religious, professional, trade and sports publications [§84-1904 (j)], violates its rights under the First Amendment to the U.S. Constitution. Despite Appellant's stipulation that its publication is not a newspaper or a religious, professional, trade or sports publication, it claims entitlement to those same exemptions.

In fact, Appellant has never alleged the two cited tax exemptions are unconstitutional per se because should the exemptions be declared unconstitutional, Appellant's publication is still subject to the sales tax and its claim for a refund of taxes could not be granted. Therefore, Appellant advances arguments before this Court which are precluded under the "case and controversy" provisions of Article III of the United States Constitution. Appellee's position regarding Appellant's lack of standing is set out at part I of his Brief.

At part II of his Brief, Appellee discusses why Arkansas' taxing structure does not violate the First Amendment. Additionally, the *Minneapolis Star* case is distinguished from the situation presented to the Court in this appeal.

Finally, at part III of his Brief, Appellee addresses why the Arkansas Supreme Court correctly declined to award Appellant attorneys' fees under 42 U.S.C. §1983.

ARGUMENT

I.

ARTICLE III OF THE UNITED STATES CONSTITUTION PRECLUDES CONSIDERATION OF THIS APPEAL.

Appellant, as well as a majority of the amici,[1] has recognized that the First Amendment of the U.S. Constitution does not prohibit a state from imposing generally applicable economic regulations, including taxes, on the commercial sales by the press. Newspaper publishers were found by this Court not "immune from any of the ordinary forms of taxation for the support of the government." *Grosjean* v. *American Press Company*, 297 U.S. 233 (1936). Arkansas, as do 44 other states, imposes a sales tax on, with respect to, or measured by, sales of tangible personal property.[2] This tax was levied to raise revenue for clearly important concerns within the purview of state government interest.[3] This Court has recognized that a state has jurisdiction to levy a sales tax on sales of tangible personal property occurring within its boundaries. *Polar Ice Cream* v. *Andrews*, 375 U.S. 361 (1964).

The thrust of Appellant's argument is not that Arkansas cannot constitutionally impose a sales tax on the sale of all publications, including Appellant's *Arkansas Times' Magazine*, or that Arkansas cannot create classifications of publications for tax purposes so long as these classifications

[1]The only exception is the amici curiae brief of The Miami Herald Publishing Company.

[2]Section 3 of Act 386 of 1941 Acts of Arkansas (Ark. Stat. Ann. §84-1903) states "there is hereby levied an excise tax of 2 percentum (now 4 percent) upon the gross proceeds or gross receipts derived from all sales to any person . . .".

[3]Section 17 of Act 386 of 1941 Acts of Arkansas, setting forth the purposes of the Act which is discussed under Argument II of this brief.

"have some rational basis." [Appellant's Brief, p. 11, citing *Minneapolis Star and Tribune Company* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).] Appellant's argument is that Arkansas can tax all sales of publications, and can even exempt some classifications of publications, but the decision to not extend the exempt classes to include Appellant's magazine is unconstitutional.

Appellant has stipulated that its *Arkansas Times'* publication is neither a newspaper nor a religious, professional, trade or sports publication as enumerated in Ark. Stat. Ann. §84-1904 (f) and (j). (Joint App. p. 21). Despite this stipulation and the fact that Appellant has *never* alleged the two tax exemptions are unconstitutional per se (for obvious reasons),[4] Appellant advances arguments which are precluded under this Court's construction and application of Article III of the United States Constitution.

Article III limits the judicial power of the United States to resolutions of "cases" and "controversies" and therefore does not grant authority to determine the constitutionality of every legislative or executive act, whether Federal or State. Inherent in any consideration of the parameters of Article III is this Court's requirement that the litigant challenging the State action have "standing".

Article III requires, as a minimum, the litigant to show (1) that he personally has suffered some actual injury as the result of the conduct of the Defendant, (2) the injury can be traced to the challenged action and (3) that he *is likely to be redressed by a favorable decision*. (Emp. added) *Valley Forge College* v. *Americas United*, 454 U.S. 464, 472 (1982). If this

[4]Should the exemptions be declared unconstitutional, Appellant's publication is still subject to the sales tax and its claim for a refund of taxes could not be granted (Appellee's Motion to Dismiss, p. 5).

Court finds the exemptions at issue are unconstitutional (despite Appellant's failure to request such a finding), then Appellant fails to satisfy the third consideration under the foregoing standing requirements because Appellant's request for a refund of taxes cannot be granted. Both the strict Article III requirements and prudential principles enunciated thereunder warrant forebearance by this Court from considering Appellant's appeal. Appellant will not personally benefit in any tangible way by a decision of this Court, unless the ruling is a pronouncement that no state may tax sales of a commercial commodity that has any ties with First Amendment rights. Such a ruling would be clearly contrary to previous decisions of this Court and inappropriate under the unique facts (discussed hereafter) involved in this appeal.

In *Allen* v. *Wright*, 468 U.S. 737 (1984), this Court discussed at length the aspect of "standing" under Article III. In that case, parents of black children alleged that the Internal Revenue Service failed to fulfill its obligations by not denying tax exempt status to racially discriminatory schools and this conduct violated plaintiff's rights under the Fifth and Fourteenth Amendments. Citing *Valley Forge College, supra*, this Court reaffirmed the rule that a plaintiff must allege personal injury likely to be redressed by the requested relief. After acknowledging the constitutional components of standing which, like all prudential doctrines are not susceptible to precise definition, the Court went on to state:

> Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. (468 U.S. at 752).

As previously stated, Appellant, having stipulated its *Arkansas Times' Magazine* is not within the classes of publi-

cations exempted, argues the exemptions must be statutorily construed to include its magazine to avoid violating the First Amendment. This Court is being requested to consider a question of constitutional law, having very far-reaching and direct effect on the taxing power of 45 states which have a retail sales or gross receipts tax by a party who, in effect, will not benefit in the form of its requested relief, a result prohibited by *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1917).

This Court has held that "those who do not possess Article III standing may not litigate as suitors in the courts of the United States. Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution . . .". *Valley Forge College, supra*, at 476.

Appellee is not advancing an Article III argument to "slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits" which troubled Justice Brennan in his dissenting opinions in *Valley Forge College* and *Allen, supra*. The Arkansas Supreme Court acknowledged in substance, but not name, the threshold problem of standing when it addressed Appellant's questioning of the constitutionality of the exemptions under the Fourteenth Amendment:

> It is first said that to exempt certain publications from the sales tax but to tax the sale of (Appellant's magazine) is a denial of equal protection. We need not explore this point for it would avail the (Appellant) nothing if it wins its argument. The legislature has levied a valid sales tax that is applicable to (Appellant). It is immaterial that an

> exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that must fall, not the tax against (Appellant).[5]

Appellant, like any plaintiff, must satisfy Article III and requirements developed thereunder. Appellant "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties". *Warth* v. *Seldin*, 422 U.S. 499 (1975).

A further factor to be considered is whether other prudential principles dictate consideration of this *specific* appeal. A review of the entire record, especially in light of Appellant's assertion that Appellee has failed to justify a differential treatment of publications, mandates the Court not consider this appeal.

Appellant, and some of its amici,[6] severely chastises Appellee for failing to submit any rational basis or compelling governmental interest supporting its tax structure that "overrides Appellant's fundamental right of freedom of speech and press and the protection of discrimination in the exercise of those rights". Appellant then lists the similarities between newspapers and its magazine and concludes that Appellee has failed to provide any rational basis for distinguishing these types of publications for purposes of the exemption in Ark. Stat. Ann. §84-1904 (f). Appellant next discusses the so-called magazine exemption [Ark. Stat. Ann. §84-1904 (j)] by listing what was alleged to be the Appellee's three justifications for differential tax treatment, concluding there is absolutely no evidence in the record to support those justifications.

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[5]Jurisdictional Statement, p. 11, November 18, 1985, Supplementary Opinion on Rehearing of Arkansas Supreme Court.

[6]Appellant's brief, p. 12-14; amicus brief of American Civil Liberties Union Foundation, p. 17 and p. 25-26; amicus brief of Times Mirror Company, p. 3.

What Appellant does not acknowledge, and what is perhaps overlooked by the various amici, is the posture of the case at the time the "justifications" were advanced by Appellee.[7] Quite simply, Appellee did not advance these justifications at any time in opposition to Appellant's claim that the exemptions were unconstitutional. **APPELLANT NEVER CLAIMED THE EXEMPTIONS WERE UNCONSTITUTIONAL, ONLY THAT APPELLEE'S INTERPRETATION WHICH DID NOT EXEMPT APPELLANT'S MAGAZINE WOULD LEAD TO AN UNCONSTITUTIONAL RESULT.** Even a cursory review of the record will demonstrate the proper context of Appellant's remarks. Appellant's argument was predicated on statutory construction and was presented in the form of a Motion for Summary Judgment[8] which by its very nature precludes testimony. Furthermore, at the hearing on that motion, Appellant stipulated that it was neither a newspaper nor one of the four enumerated publications covered by the tax exemp-

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[7]"Like the *Times*, magazines or journals printed and published by religious, professional, trade and sports groups or organizations are 'publications' but they do differ in many respects. A magazine or journal devoted exclusively to religion or to a profession, such as an accounting or medical journal, is of interest to a much smaller segment of the population than is the *Times*. Because of this fact, such publication could hardly be sold in vending boxes or at a retail location such as newsstands, grocery or drug stores and unlike the *Times* or similar magazines, would depend almost exclusively upon subscription readers for its sales. A publication of one of these four types would have little interest in or opportunity to expand its circulation outside of its area of interest. In addition, the publishers in most cases would be publishing the magazine as a service to its readership rather than as a revenue producer. The Arkansas Legislature could have had these facts and others in mind when it granted the sales tax exemption to these four types of publication." *Commissioner's Reply Brief to Arkansas Writers' Brief in Motion for Summary Judgment*, p. 42-43 of the transcript.

[8]*Arkansas Writers'* Motion for Summary Judgment before the Pulaski County Chancery Court, p. 8 of the transcript.

tions in question. When this is considered, it is easy to see why the record made in the trial court and considered by the Arkansas Supreme Court is completely devoid of any factual evidence tending to refute a First or Fourteenth Amendment challenge under this Court's guidelines. Summary judgment can only be granted when there is no genuine issue of a material fact. Appellee, in its Motion to Deny Summary Judgment, simply set forth the foregoing three "justifications" to show there were factual issues in dispute which should be considered *in response to Appellant's interpretation of the statutory exemptions.*

Despite all of the foregoing, Appellant now fashions its argument so as to require this Court to make a pronouncement of constitutional law that will directly touch the taxing system of a majority of the states, in varying degrees, without the Court having the benefit of any development of a record tending to support the issue now advanced. Appellant and its amici are urging a resolution of a legal question, not in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action, but rather in a rarified atmosphere of a debating society which was found repugnant by this Court in *Valley Forge College, supra*, at 472.

Based on fundamental principles set forth by this Court, further judicial consideration of Appellant's appeal is precluded.

II.

APPELLEE'S TAXING STRUCTURE DOES NOT VIOLATE THE FIRST AMENDMENT.

Appellant repeatedly refers to *Minneapolis Star and Tribune Company* v. *Minnesota Commissioner of Revenue*, 460 U.S. 570 (1983) as the authority which best highlights the constitutional infirmities of Arkansas' general tax laws with limited exemptions.

This Court succinctly stated the issues presented therein at page 576:

> This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

As the facts of *Minneapolis Star* were persuasive to the Court in its determination a First Amendment violation had occurred, Appellee has compared facts under consideration in this appeal with those presented by the State of Minnesota. The result is clear — Arkansas' tax does not bear the same constitutional infirmities found in *Minneapolis Star:*

MINNESOTA TAX	*ARKANSAS TAX*
(A) Tax was *a special use* tax imposed on the cost of *only* paper and ink products consumed *only* in the production of a publication.	(A) Tax is *a general sales* tax imposed on proceeds of sales of all tangible personal property less specific exemptions.
(B) Tax was unique and completely contrary to the State's general scheme of taxation since was levied on	(B) Tax consistent with the State's overall general scheme of taxation since it is not on the publisher but

MINNESOTA TAX	*ARKANSAS TAX*
the publisher consuming paper and ink and not the purchaser of the publication.	rather on the purchaser of the publication with the publisher being only the tax collecting mechanism.
(C) Tax was "use" tax even though it did not serve the function of protecting Minnesota's sales tax.	(C) Tax and exemptions deal with same type of tax and serve identical state revenue functions.
(D) Amendment creating exemption was enacted to specifically affect identifiable taxpayers already known to exist by the legislature.	(D) Both exemptions were passed before Appellant's magazine ever came into existence; thus, were not passed with any actual intent to affect known taxpayers.
(E) The exemption singled out by size only a few members of a specific class, i.e., publishers.	(E) The exemptions enumerated are sub-classifications, not dependent on size only, within a general classification.

In *Minneapolis Star*, this Court, after first setting forth the rule that it is beyond dispute that state governments can subject newspapers to generally applicable economic regulations without creating constitutional problems, stated:

> Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications . . . and, singles out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

Minnesota's treatment of publications differs from that of other enterprises in at least two important respects:[1] It imposes a use tax that does not serve the function of protecting the sales tax and it taxes an intermediate transaction rather than the ultimate retail sale. (460 U.S. at 581).

Further, the ordinary rule in Minnesota . . . is to tax only the ultimate, or retail, sale rather than the use of components like paper and ink . . . publishers, however, are taxed on their purchases of components, even though they will eventually sell their publications at retail. (460 U.S. at 582).

Arkansas, to the contrary of Minnesota's taxing scheme, has enacted what this Court has held permissible. It passed a general sales tax law in 1941 [Act 386 of 1941 (Ark. Stat. Ann. §84-1901, et seq.)] levying an excise tax of 2 percent (now 4 percent) on the gross proceeds or receipts derived from the sale of "all tangible personal property" (Ark. Stat. Ann. §84-1903). Arkansas' sales tax law (Section 17) stated that the *purpose* of the sales tax was to provide revenue for establishing and maintaining (a) schools (including free textbooks), (b) school library service, (c) state charitable institutions and (d) to support wards of the state. Within that general sales tax law a number of exemptions were passed by the legislature to recognize the special needs of the state and varied greatly to accomplish desired goals. Exemptions are granted based on:

the method of sale,[2] or,

[1]The Court also noted a third difference. The use tax is not visible to the consumers while the sales tax must, by law, be stated separately as an addition to the price (460 U.S. 581).

[2]Section 84-1904(i) exempts sales between retailers as "sale for resale" so that the tax will be charged and collected only one time, on the sale to the ultimate purchaser.

by virtue of the party making the sale,[3] or,

the person to whom the sale is made,[4] or

even the type of tangible personal property being sold.[5]

Clearly, numerous items are exempted from Arkansas' general sales tax. Consistent with Arkansas' entire taxation scheme and the legislature's purpose of providing maximum state revenue while recognizing legitimate reasons for exemptions, Act 386 of 1941 specified that the sales of newspapers would be exempt. In 1948, Arkansas passed Act 152 which extended the exemption to religious, professional, trade and sports publications. [Ark. Stat. Ann. §1904 (j)].

The *Arkansas Times*, contrary to Appellant's assertions at Pages 26-27 of its Brief, is not the only general interest magazine in the State of Arkansas which is not entitled to a tax exemption. In actuality, the vast majority of magazines sold in this State, whether religious, sports, professional, trade *or* general interest are subject to the Arkansas sales tax, because they do not satisfy all requirements of the exemption; namely, (1) "printed and published within the state"; (2) "sold through regular subscriptions"; and (3) "within the sub-classifications given". In order for any magazine to be exempt from Arkansas' sales tax, it must meet *all three* conditions as a prerequisite to claiming the exemption.

All of the factual differences between *Minneapolis Star* and that of Arkansas' general sales tax (set out above) lead to

[3]Section 84-1904(c) exempts sales by churches and §84-1904(d) exempts sales by charitable organizations.

[4]Section 84-1904(g) exempts sales to the United States Government.

[5]Section 84-1904(r)(2) exempts sales of machinery used directly in manufacturing.

this conclusion — Arkansas has not engaged in conduct violative of the First Amendment. It has not "targeted" or "singled" out the press, a practice found so constitutionally repulsive by this Court in *Grosjean* v. *American Press Co., supra,* and *Minneapolis Star, supra.* Its Legislature has not affirmatively acted to penalize publications of a certain size in existence at time of enactment. Its general sales tax fulfills a valid governmental function — the raising of state revenues.

Arkansas' taxing structure does not impair the First Amendment rights of Appellant nor substantially hinder the *Times* in its operation. In fact, all that is required of Appellant is to collect, not bear, the sales tax as do other Arkansas businesses.

The correct analysis to be applied is a "rational basis" test under Fourteenth Amendment guidelines. Appellant has not raised the Fourteenth Amendment issue in this context; however, this is a more applicable standard since Appellant has failed to demonstrate a First Amendment infringement.

This Court has always shown the greatest deference to state legislatures in devising their tax schemes and on numerous occasions acknowledged the rule that while all governmentally created classifications must have some rational basis, the fact that they have been enacted by a presumably rational legislature arms them with a presumption of rationality. The exemptions at issue here have endured for forty-five (45) and thirty-eight (38) years respectively.

States may impose different specific taxes upon different trades and professions and may vary the rate of excise upon different products. States are not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959).

Justice Rehnquist in his dissent in *Minneapolis Star* isolated the one aspect which most distinguishes the facts considered in this appeal from those involved in *Minneapolis Star,* which is that the State can only be required to justify its action in devising classifications if there has been an "infringement by the state's classification which significantly burdens specially protected rights." (460 U.S. at 600). The decision that Appellant's publication does not fall within one of the exemptions has not been shown to be an infringement upon Appellant's First Amendment rights, other than in a philosophical context, and therefore demonstrated no abridgment of a fundamental right.

Appellee has authority to impose its sales tax structure consistently with First Amendment rights. The mere fact that not all publishers are subject to the same economic regulation does not render a regulation, otherwise general in application, invalid under the First Amendment. *Regan* v. *Taxation With Representation of Washington,* 461 U.S. 540 (1983); *Mabee* v. *White Plains Publishing Company,* 327 U.S. 178 (1946). As recently as last year, this Court affirmed at least two other state court opinions involving exemptions from a tax where the exemption favored one media organization over the other. See *Matter of the Assessment of Additional North Carolina and Orange County Use Taxes* v. *Village Publishing Company,* 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, ___ U.S. ___, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985) and *Chicago Tribune Company v. Johnson,* 106 Ill. 2d 63, 477 N.E. 2d 482, appeal dismissed, ___ U.S. ___, 106 S. Ct. 241, 88 L. Ed. 2d 250 (1985). Even though in both of these cases the appeal was dismissed for lack of a substantial federal question, nevertheless they recognize adherence to the longstanding rule that, particularly in the area of taxation, a state has the greatest latitude in arriving at classifications.

Arkansas' exemptions at issue were enacted for a reason. Unfortunately, no cognizable legislative history exists explain-

ing the actions of the legislature which enacted them. However, such specific publications of limited audience, primarily sold through subscription only, could have utilized the benefits of tax exemption as other fledgling businesses.

For instance, the Arkansas Legislature has exempted from sales taxation coin-operated car washes, Ark. Stat. Ann. §84-1903(c)(3). Not only do such exemptions further a legitimate State goal of promoting initiation and growth of small businesses, but they also illustrate the State's recognition that revenues produced should exceed cost of administering the tax. The foregoing demonstrates that the exemptions at issue were not enacted by the Arkansas Legislature based on the content of publications, but rather, for other justifiable State concerns.

To attempt exemption of a publication containing largely political or social commentary (as does the *Times*) could easily have the undesirable effect of promoting punitive action by a state legislature if the publication to receive the exemption did not comply with legislative wishes. To treat such publications as these differently from the vast number of other like services and items would produce the very results so unconscionable to this Court, i.e., the threat of retaliatory governmental action based on content of a publication.

Under clear and reasoned precedent of this Court, Appellant has not demonstrated Appellee's tax structure violates the First Amendment.

III.

THE STATE COURT CORRECTLY DECLINED TO AWARD APPELLANT ATTORNEYS' FEES UNDER 42 U.S.C. §1983.

The trial court, ruling strictly on statutory construction, did not address Appellant's request for attorneys' fees (Jurisdictional Statement, p. 17) and the Arkansas Supreme Court did not reach Appellant's cross-appeal of this issue because Appellant was not the prevailing party. (Jurisdictional Statement, p. 12)

Appellee admits that state courts have concurrent jurisdiction with federal courts and may entertain actions brought under 42 U.S.C. §1988 and, if appropriate under the circumstances, award an attorney's fee under 42 U.S.C. §1983. However, the mere existence of concurrent jurisdiction does not automatically require a state court to consider and grant such relief, especially where this relief is claimed during the pursuit of a state tax refund, a procedure through which an adequate remedy is provided by the state. Existence of jurisdiction does not mean that it must be exercised nor that grounds may not be shown to persuade the court to refrain from exercising its admitted jurisdiction. *Kansas City Southern R. Co.* v. *United States*, 282 U.S. 706 (1951).

The South Carolina Supreme Court issued a recent decision in a case where a taxpayer was sustained in an action brought against the South Carolina taxing authority by virtue of a state statutory refund remedy but was refused the attorneys' fees requested pursuant to 42 U.S.C. §1983. In *Spencer* v. *South Carolina Tax Commission*, 316 S.E.2d 386 (1984), aff'd, 471 U.S. ___ (1985), Plaintiffs were residents of North Carolina who earned income in South Carolina and filed a South Carolina return claiming non-business itemized deductions.

After audit, these deductions were disallowed resulting in South Carolina tax liability. The disallowance was found by the South Carolina Supreme Court to be based upon an unconstitutional statute which violated the Privileges and Immunities Clause of the U.S. Constitution. The Court further found the state remedy complete and adequate for the taxpayer's action and therefore declined to address the claim for attorneys' fees under §1983 and §1988. The Plaintiffs argued that the Supremacy Clause may constitutionally give Congress the authority to require a state court to hear a federal cause of action and that Congress had exercised such power to its fullest extent. The South Carolina Supreme Court found such an argument ignored the clear intent expressed by Congress to limit its power by the enactment of 28 U.S.C. §1341. That section illustrates congressional intent to allow a state to handle its own fiscal affairs unimpeded by federal causes of action so long as there is a plain, speedy and efficient remedy in the state court. Since Congress has chosen to demand that state tax suits be pursued in state court pursuant to that state's remedy, it cannot logically be argued that Congress has demanded that §1983 and §1988 suits be heard in state court for tax refund suits.

To conclude that §1988 actions are required to be heard in state tax refund suits would be in direct conflict with the holding in *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981), and violates the fundamental principles of comity requiring Federal courts to defer to states on matters relating to state taxation and remedies thereunder.

The courts of two other states have considered a state tax action in state court involving a §1983 claim, and both have found the state remedy adequate and have exercised their discretion in not allowing the §1983 claim. *Bacus* v. *Chilivis*, 236 Ga. 500, 224 S.E.2d 377 (1976) and *State Tax Commission* v. *Fondren*, 387 So.2d 712 (Miss. 1980), cert. den., 450 U.S. 1040 (1981).

The similarity between the facts in this appeal and those cited above, especially *Spencer*, is remarkable. Appellee's original Complaint specified that the tax appeal was brought in the Pulaski County Chancery Court pursuant to the Arkansas Tax Procedure Act, (Ark. Stat. Ann. §84-4741) and the relief under §1988 was requested merely to authorize recovery of Appellant's attorneys' fees. The Arkansas Tax Procedure Act does not allow for attorneys' fees because the Arkansas Legislature did not intend same when it established an appeals remedy procedure for cases involving state taxes.

A number of courts in other jurisdictions have declined to award attorneys' fees in cases where the §1988 claim serves no purpose other than as a conduit for award of attorneys' fees. *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Roberts* v. *Mills*, 291 Or. 21, 628 P. 2d 714 (1981).

Further justification for invoking the discretionary denial of attorneys' fees in this action is derived from the substantive nature of the Appellee's claim. Even if tax refund claims fall within the scope of §1983, it is not the type of civil rights action that §1988 was primarily intended to encourage. The legislative history of §1988 clearly indicates that Congress did not intend to shift liability for attorneys' fees in all cases against state defendants, but rather only to encourage private enforcement of the most "basic" and "fundamental" civil rights. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976). Courts have properly given effect to the limited congressional intent that is the underlying basis of §1988 — to protect civil rights — by exercising discretion to deny fees more readily in non-civil rights cases or cases where the interests at issue are more private than public in nature. *Boland* v. *City of Rapid City*, 315 N.W.2d 496 (S.D. 1982).

Thus, in this appeal, which cannot be characterized as a

traditional civil rights action, it is particularly appropriate to exercise discretion and to deny Appellant's claim for attorneys' fees.

CONCLUSION

The issues presented by Appellant in this case were not fully developed below because of Appellant's failure to raise constitutionality *per se* of Arkansas' exemptions to its general sales tax. This alone should preclude consideration of Appellant's claims by this Court.

If such claims are to be appraised by this Court, Appellee's taxing structure should stand as not violative of the First Amendment. The Arkansas Supreme Court correctly perceived and disposed of the issues in this case.

Appellee respectfully requests that the decision of the Arkansas Supreme Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Brief for Appellee, by placing same in the U.S. Mail, First Class, postage prepaid, this 2nd day of October, 1986, on Anne Owings Wilson, Attorney for Appellant, at HOUSE, WALLACE, NELSON & JEWELL, P.A., 1500 Tower Building, Little Rock, Arkansas 72201, Rex S. Heinke, GIBSON, DUNN & CRUTCHER, 333 South Grand Ave., Los Angeles, California 90071, Philip Kaplan, KAPLAN, BREWER & MILLER, P.A., 415 Main Street, Little Rock, Arkansas 72201, Donald M. Middlebrooks, STEEL, HECTOR & DAVIS, 4000 Southeast Financial Centre, Miami, Florida 33131, David Minton, 1319 Eighteenth Street, N.W., Washington, D.C. 20036, E. Barrett Prettyman, Jr., HOGAN & HARTSON, 815 Connecticut Avenue, N.W., Washington, D.C. 20006 and Edward Soto, Southeast Financial Centre, Suite 4350, Miami, Florida 33131.

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